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No. 96-5955

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In The
Supreme Court of the United States

October Term, 1996

STEINEY J. RICHARDS,
Petitioner,

vs.

STATE OF WISCONSIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF
AMICI CURIAE
OF
AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

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STATUTES AUTHORIZING JUDICIAL PREAPPROVAL OF UNANNOUNCED ENTRIES APPROPRIATELY ADDRESS THE SAFETY CONCERNS OF OFFICERS WHILE IMPOSING THE OBJECTIVITY AND DETACHED NEUTRALITY OF A MAGISTRATE.

SUCH STATUTES, HOWEVER DESIRABLE FROM A PUBLIC-POLICY PERSPECTIVE, ARE NOT A CONSTITUTIONAL IMPERATIVE. THE "REASONABLENESS CLAUSE" OF THE FOURTH AMENDMENT DOES NOT MANDATE JUDICIAL PREAPPROVAL OF THE EXACT MANNER IN WHICH WARRANTS MUST BE EXECUTED. 5

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BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE RESPONDENT.

This brief is filed pursuant to Rule 37 of the United States Supreme Court. Consent to file has been granted by respective Counsel for the Petitioner and Respondent. The letters of consent have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF *AMICI CURIAE*

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various state and federal constitutions.

AELE has previously appeared as *amicus curiae* over 100 times in the Supreme Court of the United States and over 35 times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio, and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The International Narcotic Enforcement Officers Association, Inc. (INEOA), is the largest organization of drug law enforcement officers in the world, consisting of more than 10,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among law enforcement officers. It is interested in the effective administration of justice and in protecting the safety and rights of law enforcement as well as respecting the rights guaranteed to all under the Constitution.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the

standard of professionalism among the nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

Amici are national professional associations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of executing and overseeing the process of search warrants within the bounds of the law; and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, including the formulation and implementation of policy on the execution of search warrants.

Because of the relationship with our members, and the composition of our membership and directors—including active law enforcement administrators and counsel—we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

STATEMENT OF THE CASE

The Supreme Court of Wisconsin ruled in *State v. Richards*, 549 N.W.2d 218 (Wis. 1996), that the police are not required to adhere to the rule of "knock and announce" when executing a search warrant involving felonious drug delivery. The court said that exigent circumstances that are always present when executing search warrants involving felonious drug delivery include the extremely high risk of serious, if not deadly, injury to the police and the potential for disposal of drugs prior to police entry to serve a warrant.

The Wisconsin court adopted a blanket rule to the effect that it is reasonable to dispense with the knock and announce

requirements that the United States Supreme Court said in the case of *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), is part of the Fourth Amendment reasonableness requirement. The *Wilson* Court did indicate that exceptions could be made to the general knock and announce requirement based upon exigent circumstances, but the petitioner is expected to argue in this case that such exceptions must be made on a case-by-case basis, not across the board for a class of cases, as the Wisconsin court has done.

SUMMARY OF ARGUMENT

Amici take the position that the Wisconsin court is correct; that in search warrant cases involving felonious drug charges, the risk of injury or death to the executing officers is so great that in this class of cases the officers are constitutionally excused from the knock and announce requirement within the parameters of the Court's discussion in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), of exigent circumstances.

Statutes that authorize the judicial preapproval of unannounced entries appropriately address the safety concerns of officers while imposing the objectivity and detached neutrality of a magistrate. They are to be encouraged. Nevertheless, while they are desirable from a public-policy perspective, they are not a constitutional requirement. The "reasonableness clause" of the Fourth Amendment does not require judicial preapproval of the exact manner in which warrants must be executed.

ARGUMENT

BECAUSE OF THE VERY REAL POSSIBILITY OF PERSONAL DANGER, AND THE DESTRUCTION OF CONTRABAND, POLICE OFFICERS ARE USUALLY JUSTIFIED IN MAKING AN UNANNOUNCED ENTRY TO EXECUTE A DRUG-RELATED SEARCH WARRANT.

STATUTES AUTHORIZING JUDICIAL PREAPPROVAL OF UNANNOUNCED ENTRIES APPROPRIATELY ADDRESS THE SAFETY CONCERNS OF OFFICERS WHILE IMPOSING THE OBJECTIVITY AND DETACHED NEUTRALITY OF A MAGISTRATE.

SUCH STATUTES, HOWEVER DESIRABLE FROM A PUBLIC-POLICY PERSPECTIVE, ARE NOT A CONSTITUTIONAL IMPERATIVE. THE "REASONABLENESS CLAUSE" OF THE FOURTH AMENDMENT DOES NOT MANDATE JUDICIAL PREAPPROVAL OF THE EXACT MANNER IN WHICH WARRANTS MUST BE EXECUTED.

In *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), the Court took up the question of whether the Fourth Amendment requires that police officers knock and announce their presence and purpose before executing search warrants on premises. In an unanimous opinion written by Justice Thomas, this Court adopted the common law rule for the first time as constitutionally required.

The Court then went on to hold that the exception urged by the brief filed by *amici* in that case based upon proper law enforcement interests should be recognized. "[A]lthough a search and seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." 115 S. Ct. at 1919.

The Court cited case law authority for three types of situations where unannounced entries have been found reasonable under the Fourth Amendment: (1) officer safety, (2)

escaped prisoners, and (3) risk of destruction of evidence. The Court, however, made it clear that this might be a short list, noting that "we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment." 115 S. Ct. at 1919.

The Court did not deal with a host of other issues suggested by the decision. One is the issue dealt with by the Wisconsin Supreme Court in this case, i.e., whether the class of cases dealing with felony drug charges excuses compliance with the knock and announce requirement.

The *Richards* opinion quotes many newspaper accounts and academic studies and reports illustrating the special dangers that law enforcement officers face in this class of cases. *Amici* will not repeat these sources but can add that our experience as law enforcement administrators and officials supports the conclusion that this class of cases is so fraught with danger for law enforcement officers that an across-the-board exemption from the *Wilson* rule is justified.

The danger law enforcement officers face in drug cases is so obvious that some courts have taken judicial notice of it. In the recent case of *State v. Curtis*, 681 So. 2d 1287 (La. App. 1996), for example, in the context of weapons' frisks of drug suspects, the court stated:

> Common sense dictates that a police officer should be permitted to pat-down a suspect who reasonably appears to be dealing drugs. *We can take notice that drug traffickers and users have a violent lifestyle, which is exhibited by the criminal element who are generally armed due to the nature of their illicit business.* Therefore, a police officer should be permitted to frisk a suspect following an investigatory stop (based on reasonable suspicion) relating to drug activities. . . .

681 So. 2d at 1292 (emphasis added).

As noted in *Wilson*, some states have adopted statutes regulating the knock and announce procedure. For example, Nebraska Revised Statutes section 29-411; New York Code of Criminal Procedure section 690.05; North Dakota Century Code section 29-29-01; North Dakota Rule of Criminal Procedure 41; Utah Code Annotated section 77-23-210; and Wisconsin Statutes Annotated section 968.12. The statutory formulation of the knock and announce procedure is a process that *amici* support as a means of giving law enforcement officers clear guidelines on this subject. Two examples of these statutory provisions are found in the Appendix to our brief.

As noted by one commentator, Burkoff: "A handful of courts has held that executing officers should be able to follow a blanket rule permitting such 'no-knock' entries in certain discrete categories of cases, like all searches for narcotics or of places where weapons are known to be present." J. Burkoff, Search Warrant Law Deskbook at 12-19 (1996).

While Burkoff contends that the constitutionality of a blanket approach to exigency under *Wilson* may be "questionable," *amici* know from our perspective that the practical realities of the pervasive dangers involved in felony drug cases would support a rule similar to that adopted by the Wisconsin court.

Flexibility and practicality have long been the cornerstone of the approach of this Court in dealing with the practical problems of law enforcement that fall within the purview of the Fourth Amendment. Thus, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court recognized that police officers must have flexibility greater than that allowed by the Fourth Amendment probable cause requirement to deal with potentially dangerous confrontations with criminal suspects, and adopted the reasonable suspicion standard. Additionally, in *New York v. Belton*, 453 U.S. 454 (1981), the Court adopted a bright line rule for the search of motor vehicles that comported with the practical exigencies that officers face in dealing with custodial

arrests of occupants of vehicles. Finally, in *United States v. Leon*, 468 U.S. 897 (1984), this Court recognized the essentially practical basis for the Fourth Amendment exclusionary rule, i.e., deterrence, and ruled in favor of a Fourth Amendment jurisprudence bound not by technicalities but by the practical realities of the difficult and dangerous tasks of law enforcement officers in the real world of the Twentieth Century.

Many more examples could be given, but *amici* simply request that the Court—as it has in the past—give due deference to the practical realities of law enforcement in executing search warrants in felony drug cases. We echo the words of the court in *State v. Curtis*, 681 So. 2d 1287 (La. App. 1996), that "drug traffickers and users have a violent lifestyle, which is exhibited by the criminal element who are generally armed due to the nature of their illicit business."

In addition to statutory regulation of police activity in this area of operations, there is the matter of police administrative policy, rules and regulations. *Amici* believe that this entire subject should be addressed by every agency's administrative guidance.

Amici respectfully request this Court to not create a constitutional imperative of knock and announce in cases involving felony drug charges. As this Court wisely noted in the majority opinion of Justice O'Connor in *Davis v. United States*, 114 S. Ct. 2350 (1994), there is a *critical difference* between a sound *police practice* and a *constitutional imperative*, a position taken by *amici* AELE, IACP, and NSA in the recent case of *Ohio v. Robinette*, 117 S. Ct. 417 (1996), and, in effect, adopted by this Court in that case on the issue of advisement of rights in consent-to-search cases.

An inflexible constitutional imperative of knock and announce unless specific exemption has been given by an issuing magistrate ignores the realities of the special dangers posed by felony drug cases and the fast-moving events that usually attend

such activities, and needlessly places the lives of law enforcement officers at greater than tolerable risk.

CONCLUSION

Amici urge this Court to affirm the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

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APPENDIX

Nebraska Revised Statutes Section 29-411 (1996).

29-411. Warrants and arrests; powers of officer; direction for executing search warrant; damages

In executing a warrant for the arrest of a person charged with an offense, or a search warrant, or when authorized to make an arrest for a felony without a warrant, the officer may break open any outer or inner door or window of a dwelling house or other building, if, after notice of his office and purpose, he is refused admittance; or without giving notice of his authority and purpose, if the judge or magistrate issuing a search warrant has inserted a direction therein that the officer executing it shall not be required to give such notice, but the political subdivision from which such officer is elected or appointed shall be liable for all damages to the property in gaining admission. The judge or magistrate may so direct only upon proof under oath, to his satisfaction that the property sought may be easily or quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice be given; but this section is not intended to authorize any officer executing a search warrant to enter any house or building not described in the warrant.

Utah Code Annotated section 77-23-210 (1996).

77-23-210. Force used in executing warrant—When notice of authority is required as a prerequisite

When a search warrant has been issued authorizing entry into any building, room, conveyance, compartment, or other enclosure, the officer executing the warrant may use such force as is reasonably necessary to enter:

(1) if, after notice of his authority and purpose, there is no response or he is not admitted with reasonable promptness; or

(2) without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.